IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1085

TELEPHONE ANSWERING SERVICE CO., INC.,
(Subsidiary Companies:
TELEPHONE ANSWERING SERVICE, INC.,
NORTH AMERICAN ANSWERING SERVICE, INC.,
TELEPHONE AND RADIO ANSWERING SERVICE COMPANY, INC.,
(MARYLAND), AND
TELEPHONE AND RADIO ANSWERING SERVICE COMPANY, INC.,
(TEXAS)),

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN S. McDANIEL, JR.,
CALHOUN BOND,
LAWRENCE A. KAUFMAN,
915 Blaustein Building,
Baltimore, Maryland 21201,
Attorneys for Petitioners-Appellants.

Of Counsel:
CABLE, McDANIEL, BOWIE
& BOND,
915 Blaustein Building,
Baltimore, Maryland 21201.

The Daily Record Co., Baltimore, Md. 21202

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING WRIT:	
I. THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT DIRECTLY CONFLICTS WITH DECISIONS OF THE COURTS OF APPEALS FOR THE SECOND AND NINTH CIRCUITS	6
II. THE PROPER DISPOSITION OF THIS CASE INVOLVES AN IMPORTANT QUESTION OF LAW WHICH SHOULD BE SETTLED BY THIS COURT	10
CONCLUSION	12

CITATIONS

CASES:	PAGE
Berghash, et al. v. Commissioner, 43 T.C. 743 (1965)	8
Breech, et al. v. United States, 439 F.2d 409 (C.C.A. 9, 1971)	6, 7, 9
Commissioner v. Berghash, et al., 361 F.2d 257 (C.C.A. 2, 1966)	6, 7, 8, 9
Pridemark, Inc. v. Commissioner, 345 F.2d 35 (C.C.A. 4, 1965)	8, 9

PAGE

STATUTES:

United States Code
Title 26
Sec. 337(a) 3, 6, 7, 8, 9, 10, 11
Sec. 354 ..... 6, 7, 8, 9
Sec. 368(a)(1)(D) 6, 7, 8, 9
Title 28
Sec. 1254(1) 2

OTHER AUTHORITIES:

Report of House Ways and Means Committee, 1954 U.S. Code Congressional and Administrative News 782 6
Report of Senate Finance Committee, 1954 U.S. Code Congressional and Administrative News 2894 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

TELEPHONE ANSWERING SERVICE CO., INC.,
(Subsidiary Companies:
TELEPHONE ANSWERING SERVICE, INC.,
NORTH AMERICAN ANSWERING SERVICE, INC.,
TELEPHONE AND RADIO ANSWERING SERVICE COMPANY, INC.,
(MARYLAND), AND
TELEPHONE AND RADIO ANSWERING SERVICE COMPANY, INC.,
(TEXAS)),
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit finally entered in this proceeding on November 8, 1976.

OPINIONS BELOW

The opinion of the Tax Court is reported at 63 T.C. 423 (1975) and is reprinted in Appendix A hereto[1] at pp. 1a-21a.

[1] The separate Appendix to this petition is hereafter cited as "App.".

The decision of the Tax Court stating its deficiency determination was entered May 27, 1975 and is reprinted at App. B, pp. 22a-23a. The opinion of the Court of Appeals, which is not officially reported, is reprinted at App. C, pp. 24a-25a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1976, and this petition for certiorari is filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Prior to adoption of the Internal Revenue Code of 1954 this Court had held, in response to efforts by the Internal Revenue Service to collect the maximum amount of income taxes, that if a corporation sold assets and then liquidated, the corporation was taxable on the gain realized from the sale and the stockholders were taxable on the gain from the liquidation, but that if the corporation was liquidated and the assets were sold after liquidation, the corporation was not subject to any tax. Although this Court was of the opinion that a "distinction between sales by a corporation as compared with distribution in kind followed by shareholder sales may be particularly shadowy and artificial" and that there were "oddities in tax consequences", it deemed these to have been mandated by Congress. In an effort to remove the uncertainties which had arisen and establish a "definitive rule", Congress, when it enacted the Internal Revenue Code of 1954, specifically provided that no taxes should be imposed on gains realized by corporations from sales of assets if such sales were made after the corporation had adopted a plan of liquidation and the corporation distributed all of its assets to its stockholders in complete liquidation within 12 months after adopting the plan.

The question presented is whether a corporation which has in fact been dissolved and completely liquidated should be deemed not to have been completely liquidated solely because in effecting the liquidation it transferred a part of its assets to another corporation and distributed the stock of such other corporation to its stockholders.

STATUTE INVOLVED

The statute involved in this case is Section 337(a) of the Internal Revenue Code of 1954 (26 U.S.C. Sec. 337(a)), which provides:

"(a) GENERAL RULE.—If—

(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period."

STATEMENT OF THE CASE

This case involves an alleged deficiency in Federal income tax of $70,566.46. The Court of Appeals affirmed *per curiam* the Tax Court's deficiency determination.

The sole disputed issue presented to the Tax Court was whether Telephone Answering Service Co., Inc. (hereafter "Tasco") distributed all of its assets to its stockholders in complete liquidation.[2] The parties and the Courts below agreed that the resolution of this issue was dependent upon the legal consequences of Tasco's actions in transferring a part of its assets to another

[2] Although the case originally involved several other issues, these were all settled prior to trial.

corporation and distributing the stock of such corporation to its stockholders instead of transferring such part of its assets directly to its stockholders.

Tasco was engaged in the telephone answering service business in various parts of the United States. Although a small part of its business activities was conducted directly by it, most of the business was carried on by two wholly-owned subsidiaries — Telephone Answering Service, Inc. (hereafter "Houston") and North American Answering Service, Inc. (hereafter "North American"). Tasco and its subsidiaries filed consolidated income tax returns. Tasco provided the management for the subsidiaries, which paid it management fees. In addition to owning all of the stock of the subsidiaries Tasco also held debt of the subsidiaries.

Tasco received an offer from General Waterworks Corporation to acquire all of the stock and debt of Houston owned by Tasco for a total consideration of $723,675, all of which was to be paid in cash. Tasco desired to accept this offer and adopted a Plan of Complete Liquidation and Dissolution which specifically authorized the sale of the Houston stock and debt to General Waterworks Corporation, generally authorized sales of any other assets and directed that Tasco be dissolved and liquidated and that all of its assets remaining after providing for its liabilities be distributed to its stockholders in complete cancellation and redemption of Tasco's stock. The Plan authorized the Directors of Tasco to transfer any assets of Tasco to one or more wholly-owned subsidiaries and to distribute the stock of said subsidiaries to the Tasco stockholders in effecting the liquidation.

Following the adoption of the Plan of Complete Liquidation and Dissolution, Tasco entered into an agreement with General Waterworks Corporation for the sale of the Houston stock and debt in accordance with

the offer. This agreement was performed in due course and Tasco received the entire consideration in cash. As a result of this sale Tasco realized a gain of $268,994.85. No other assets of the enterprise were sold with the exception of one of the telephone answering services which was operated by North American and which it sold to a minority stockholder of Tasco.[3]

Following the sale of the Houston stock and debt and the receipt of the entire consideration, Tasco transferred all of its assets other than the North American stock and $722,712.50 cash to another wholly-owned subsidiary (hereafter "New Tasco") in exchange for shares of New Tasco stock and Tasco then proceeded to liquidate by distributing all of the North American and New Tasco stock plus the $722,712.50 cash to the Tasco stockholders in complete cancellation and redemption of the Tasco stock. This distribution was made at the rate of one share of North American stock, one share of New Tasco stock and $8.50 cash for each share of Tasco stock. In connection with this distribution the Tasco stockholders were informed by Tasco that each share of New Tasco stock had a value of $1.50, that each share of North American stock had a value of $2.50 and that the amount by which the total distribution of $12.50 per share exceeded the stockholder's basis for the Tasco stock would be taxable as a capital gain.

The Tax Court held that Tasco was not completely liquidated since "substantially the same shareholders continue to utilize a substantial part of the directly owned assets of the same enterprise in uninterrupted corporate form." The Court of Appeals affirmed for the reason that "operations [of Tasco] were continued without interruption by a corporation organized at the time of the sale for the benefit of shareholders virtually identical to TASCO's."

[3] The tax consequences of this sale are not involved in the present case.

REASONS FOR GRANTING WRIT

The Court of Appeals' decision conflicts squarely with decisions of the Courts of Appeals for the Second and Ninth Circuits. *Commissioner v. Berghash, et al.*, 361 F.2d 257 (C.C.A. 2, 1966) and *Breech, et al. v. United States*, 439 F.2d 409 (C.C.A. 9, 1971).

The decision of the Fourth Circuit and the conflicting decisions of the Second and Ninth Circuits involve an important area of law as to which this Court has not directly addressed itself and which should be settled by this Court.

I.

THE DECISION OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT DIRECTLY CONFLICTS WITH DECISIONS OF THE COURTS OF APPEALS FOR THE SECOND AND NINTH CIRCUITS.

Although the purpose of the Congress in adopting Section 337 of the Internal Revenue Code was to adopt a "definitive rule which will eliminate the present uncertainties",[4] it was not entirely successful, since the Government almost immediately began contending that Section 337 was not applicable in all instances, notwithstanding that the selling corporation had been dissolved and had distributed all of its assets. In some instances these contentions were based on the propositions that (a) the dissolution and distribution of assets were merely steps in a reorganization meeting the requirements of Sections 354 and 368(a)(1)(D) of the Internal Revenue Code of 1954 (26 U.S.C. Secs. 354 and 368(a)(1)(D)[5] and (b) the Federal income tax consequen-

[4] Reports of House Ways and Means Committee and Senate Finance Committee, 1954 U.S. Code Congressional and Administrative News 782 and 2894.

[5] Briefly summarized, these sections require a transfer by one corporation of substantially all of its assets to another corporation and the distribution to the stockholders of the first corporation of all of the stock, securities and property received by the first corporation for the transfer.

ces, both to the selling corporation and to its stockholders, should be governed by the provisions of the Internal Revenue Code dealing with reorganizations rather than those, such as Section 337, dealing with liquidations. In other instances these contentions were based on the so-called liquidation-reincorporation or corporate solution theory that even though were was no reorganization, there was no "complete liquidation" for the purposes of Section 337 because following the completion of the entire transaction assets of the selling corporation were held by another corporation controlled by the same stockholders.

The Courts held with substantial unanimity that where the transaction as a whole met the requirements of Sections 354 and 368(a)(1)(D), Section 337 was not applicable to a sale of assets by one of the corporations which was a party to the reorganization, notwithstanding that as a part of the reorganization such selling corporation was dissolved and distributed all of its assets in complete liquidation. On the other hand, prior to the decisions of the Tax Court and of the Court of Appeals in the present case, no Court had held that Section 337 should not be applied to sales by a corporation merely because following the liquidation of the selling corporation some of its assets were held by another corporation controlled by the same stockholders and the Courts of Appeals for the Second and Ninth Circuits had expressly held to the contrary. *Commissioner v. Berghash, et al., supra; Breech, et al. v. United States, supra.*

Commissioner v. Berghash, et al., involved a sale by Delavan-Bailey Drug Co., Inc. of all of its operating assets to another corporation in exchange for 50% of its stock and a note. The other remaining 50% of the stock of the other corporation was owned by an unrelated person. Following the sale, Delavan-Bailey was dissolved and all of its assets (including the 50% of the stock of the buying corporation and the note of the

buying corporation) were distributed to Delavan-Bailey's stockholders. In the Tax Court the Government contended both that the transaction constituted a reorganization meeting the requirements of Sections 354 and 368(a)(1)(D) and that in any event Section 337 was not applicable to the sale because it "can apply only where a bona fide termination of the business of the liquidating corporation has occurred". *Berghash, et al. v. Commissioner,* 43 T.C. 743 at 758 (1965). The Tax Court rejected both contentions, holding that there was no reorganization because the Delavan-Bailey stockholders ended up holding only 50% of the stock of the buying corporation instead of the requisite 80% and that the continuation of the business in corporate form did not prevent the application of Section 337 to the gain which had been realized by Delavan-Bailey from the sale of assets. The Court of Appeals for the Second Circuit affirmed on both points, stating 361 F.2d at 260:

> "The only point upon which we see any need to expand upon the Tax Court's decision is the Commissioner's argument that, if the business of the liquidated corporation is continued by the new corporation, there is no 'complete liquidation.' * * * We are in complete agreement with the Tax Court's resolution of this issue; its interpretation reflects the normal meaning of the words 'complete liquidation' in sections 331 and 337. To adopt the Commissioner's contention would do violence to the plain meaning of these statutes."

Significantly, the Court of Appeals for the Second Circuit noted that the only authority for the Commissioner's contention was dictum in the decision of the Court of Appeals for the Fourth Circuit in *Pridemark, Inc. v. Commissioner,* 345 F.2d 35 at 41 (C.C.A. 4, 1965).[6]

[6] In *Pridemark, Inc.,* the Court of Appeals for the Fourth Circuit found that although the selling corporation transferred assets to another corporation which was controlled by the same stockholders, there was no continuation of the business and, therefore, Section 337 was applicable to the sale.

Breech, et al. v. United States, supra involved a sale by Valley Ford Sales ("Valley-1") to Valley Ford Sales ("Valley-2"). 20% of the stock of Valley-2 was owned directly by a stockholder of Valley-1. The remaining 80% of the stock of Valley-2 was owned by another corporation, 75% of the stock of which was owned by other stockholders of Valley-1. The Court of Appeals for the Ninth Circuit rejected the contentions of the Government that the transaction was a reorganization meeting the requirements of Section 354 and 368(a)(1)(D), holding that the indirect holdings in Valley-2 by some of Valley-1's stockholders could not be combined with the direct holding in Valley-2 by another of Valley-1's stockholders for the purpose of meeting the 80% requirement. The Court of Appeals also expressly rejected the Government's contention that

> "the liquidation of Valley-1 cannot qualify as a 'complete liquidation' within the meaning of Section 331 and 337 because the assets of Valley remained in corporate solution under the effective control of the same taxpayers who controlled Valley-1 even though Valley-1 was completely dissolved under California law." 439 F.2d at 410.

Significantly, the Court of Appeals for the Ninth Circuit also expressly refused to follow the dictum of the Court of Appeals for the Fourth Circuit in *Pridemark, Inc. v. Commissioner, supra* and elected to follow the decision of the Court of Appeals for the Second Circuit in *Commissioner v. Berghash, et al., supra.*

The Court below, in affirming the Tax Court, placed itself squarely in opposition to the Second and Ninth Circuits. Although the Government had contended in the Tax Court that the transfer of assets by Tasco to New Tasco constituted a reorganization meeting the requirements of Sections 354 and 368(a)(1)(D), the Tax Court did not reach that issue. See Footnote 4 to its Opinion, 63 T.C. at 432 (App. 13a). Instead, it held that Section 337 is not applicable to the sale of the Houston

stock and debt solely because "the same shareholders continue to utilize a substantial part of the directly owned assets of the same enterprise in uninterrupted corporate form", 63 T.C. at 433 (App. 14a), and the liquidation of Tasco did not effect "a sufficient transmutation of the assets of petitioner out of corporate solution to satisfy the requirement of section 337 that 'all of the assets of the corporation' be distributed." 63 T.C. at 435 (App. 16a). These holdings were adopted *in toto* by the Court of Appeals for the Fourth Circuit when it stated that "We are content to rest decision on the Tax Court's opinion". (App. 25a).

II.

THE PROPER DISPOSITION OF THIS CASE INVOLVES AN IMPORTANT QUESTION OF LAW WHICH SHOULD BE SETTLED BY THIS COURT.

As indicated *supra,* the purpose of Congress in enacting Section 337 was to adopt a "definitive rule which will eliminate the present uncertainties". The effect of the decision of the Court of Appeals for the Fourth Circuit in the present case is to raise new uncertainties. See the comments by Judge Sterrett in his dissenting opinion, 63 T.C. at 438 (App. 20a).

It would appear from Footnote 9 to the Tax Court's opinion, 63 T.C. at 436 (App. 17a), that if Tasco's business had been conducted entirely through three subsidiaries, it had sold the stock and debt of one such subsidiary and had then dissolved and distributed the stock of the other two subsidiaries, Section 337 would have precluded the imposition of any tax on the gain realized from the sale of the stock and debt. On the other hand, it would appear that if all of the answering services had been directly operated by Tasco, it desired to dispose of one part of its business and split up the balance into two separate corporations and in order to accomplish this, it transferred different parts of its

assets to three subsidiaries, sold one such subsidiary and distributed the stock of the other two subsidiaries pro rata to the Tasco stockholders, the gain from the sale would be taxable since each of the two distributed subsidiaries would continue to utilize a substantial part of Tasco's assets and continue operation of businesses which had been conducted by Tasco.

It is a matter of common knowledge that some business enterprises are conducted entirely by a single corporation, that other exactly similar enterprises are conducted in part directly by a parent corporation and in part by subsidiaries and that still others are conducted entirely through subsidiaries. It is difficult to believe that in enacting Section 337 the Congress intended to effect an exaltation of form over substance and to require different tax consequences where an enterprise is liquidated, a part of its business is sold and the remaining parts are divided between two separate continuing corporations depending purely upon whether or not some part of the activities of the enterprise had been directly conducted by a parent corporation and other parts had been conducted by subsidiaries, yet this is exactly what the Court of Appeals for the Fourth Circuit has found was intended.

Although many of the Courts of Appeals and other lower Courts have had occasion to consider so-called liquidation-reincorporation transactions and, until the decision in the present case, have uniformly held that unless there is a reorganization, the transfer of some of the assets of the liquidating corporation to a continuing corporation does not affect the completeness of the liquidation, this Court has never had occasion to consider this particular issue.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN S. MCDANIEL, JR.,
CALHOUN BOND,
LAWRENCE A. KAUFMAN,
915 Blaustein Building,
Baltimore, Maryland 21201,
Attorneys for Petitioners-Appellants.

Of Counsel:
CABLE, MCDANIEL, BOWIE & BOND,
915 Blaustein Building,
Baltimore, Maryland 21201.

Supreme Court, U. S.
FILED
FEB 4 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1085

TELEPHONE ANSWERING SERVICE CO., INC.,
(Subsidiary Companies:
TELEPHONE ANSWERING SERVICE, INC.,
NORTH AMERICAN ANSWERING SERVICE, INC.,
TELEPHONE AND RADIO ANSWERING SERVICE COMPANY, INC.,
(MARYLAND), AND
TELEPHONE AND RADIO ANSWERING SERVICE COMPANY, INC.,
(TEXAS)),

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN S. McDANIEL, JR.,
CALHOUN BOND,
LAWRENCE A. KAUFMAN,
915 Blaustein Building,
Baltimore, Maryland 21201,
Attorneys for Petitioners-
Appellants.

Of Counsel:
CABLE, McDANIEL, BOWIE
& BOND,
915 Blaustein Building,
Baltimore, Maryland 21201.

The Daily Record Co., Baltimore, Md. 21202

INDEX

PAGE

Appendix A:

Opinion of United States Tax Court, Theodore Tannenwald, Jr., Judge, filed December 24, 1974 ..... 1a

Appendix B:

Decision of the United States Tax Court, Theodore Tannenwald, Jr., Judge, Entered May 27, 1975 ..... 22a

Appendix C:

Opinion of the United States Court of Appeals for the Fourth Circuit, decided November 8, 1976 ..... 24a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

TELEPHONE ANSWERING SERVICE CO., INC.,
(Subsidiary Companies:
TELEPHONE ANSWERING SERVICE, INC.,
NORTH AMERICAN ANSWERING SERVICE, INC.,
TELEPHONE AND RADIO ANSWERING SERVICE COMPANY, INC.,
(MARYLAND), AND
TELEPHONE AND RADIO ANSWERING SERVICE COMPANY, INC.,
(TEXAS)),

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX A

TELEPHONE ANSWERING SERVICE CO., INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 1544-69. Filed December 24, 1974.

TASCO owned 100 percent of the stock of both Houston and North American in addition to operating a telephone-answering service directly and providing managerial services to those two

subsidiaries, which themselves operated telephone-answering services. After having been approached concerning the stock of Houston, TASCO on Mar. 18, 1966, created New TASCO as a wholly owned subsidiary and on May 13, 1966, adopted a plan of liquidation and approved the sale of the Houston stock. The sale was closed on Oct. 31, 1966. On Mar. 31, 1967, TASCO transferred all its assets excluding its North American stock, its New TASCO stock, and cash to New TASCO in exchange for the latter's stock. On Apr. 19, 1967, TASCO distributed all its cash, North American stock, and New TASCO stock to its shareholders in liquidation. *Held,* the transaction in question did not satisfy the requirements of sec. 337, I.R.C. 1954.

John S. McDaniel, Jr., Calhoun Bond, and *Lawrence A. Kaufman,* for the petitioner.
Eli H. Schmukler, for the respondent.

OPINION

TANNENWALD, Judge: Respondent determined deficiencies of $8,527.55 and $72,329.02 in the Federal income taxes of petitioner, which filed consolidated returns, for the taxable years ended November 30, 1965 and November 30, 1966, respectively. Concessions having been made, the sole issue for determination is whether the gain realized by petitioner on the sale of all the stock of one of its subsidiaries to a third party is to be recognized. The resolution of this issue depends upon whether the factual pattern involved herein meets the requirements of section 337.[1]

All of the facts have been stipulated and are so found. The stipulation of facts, together with the exhibits attached thereto, is incorporated herein by this reference.

Petitioner, Telephone Answering Service Co., Inc. (TASCO), was a corporation organized under the laws of the State of Maryland with its principal office at 1615 Court Square Building, Baltimore, Maryland.

[1] All statutory references are to the Internal Revenue Code of 1954, as amended, unless otherwise indicated.

For the taxable year ended November 30, 1965, TASCO and its two subsidiaries, Telephone Answering Service, Inc. — a corporation organized under the laws of the State of Texas with its principal office at 3317 Montrose Boulevard, Houston, Texas (hereinafter referred to as Houston) — and North American Answering Service, Inc. — a corporation organized under the laws of the State of Maryland with its principal office at 1615 Court Square Building, Baltimore, Maryland (hereinafter referred to as North American) — filed a consolidated income tax return with the district director of internal revenue at Baltimore, Maryland. For the taxable year ended November 30, 1966 (in the case of Houston covering only the period ended October 31, 1966), TASCO and its subsidiaries, North American, Houston, Telephone and Radio Answering Service Company, Inc. — a corporation organized under the laws of the State of Maryland with its principal office at 1615 Court Square Building, Baltimore, Maryland (hereinafter referred to as New TASCO) — and Telephone and Radio Answering Service Company, Inc. — a corporation organized under the laws of the State of Texas with its principal office at 3317 Montrose Boulevard, Houston, Texas (hereinafter referred to as Radio) — filed a consolidated income tax return with the district director of internal revenue at Baltimore, Maryland.

TASCO was organized on November 14, 1950, under the name of Doctors' Telephone Exchange, Inc. In February 1961, the corporation's name was changed to Doctors' Telephone Exchange and Physicians' Telephone Exchange, Inc.

TASCO operated various telephone answering services under the aforesaid name until June of 1961, at which time an agreement was entered into between Doctors' Telephone Exchange and Physicians' Telephone Exchange, Inc., William A. Houser (hereinafter referred to as Houser), Alex Brown and Sons (acting for undisclosed principals), and Walter Lohr whereby the stock of Houston was to be acquired. To carry out this acquisition of stock, the certificate of incorporation of Doctors' Telephone Exchange and Physicians' Telephone Exchange, Inc., was again modified so that the

corporation's name became Telephone Answering Service Co., Inc., and the number of shares of authorized stock was increased from 50,000 to 1,000,000. On June 30, 1961, 38,370 shares of TASCO stock were issued to Houston shareholders in exchange for 21,000 shares (100 percent) of Houston stock.

In January 1962, North American was incorporated and TASCO acquired all of its originally issued capital stock. During 1962, North American acquired telephone answering services located in Bala-Cynwyd, a suburb of Philadephia; in Joilet, a suburb of Chicago; and in Cleveland Heights, a suburb of Cleveland, Ohio. In addition, North American's charter was changed so that it could provide radio-telephone services.

By mid-year 1962, TASCO was operating telephone answering services in the vicinity of Baltimore, Maryland, and its suburbs and was the sole stockholder of two corporations: North American, which operated telephone answering services in the suburbs of Philadelphia, Chicago, and Cleveland; and Houston, which operated telephone answering services in the Houston, Fort Worth, and Pasadena areas of Texas. With minor exceptions, the officers, directors, areas of operation, and type of services provided by TASCO, Houston, and North American remained unchanged from mid-1962 until the years in issue.

By mid-year 1962, TASCO had between 40 and 50 shareholders. With the exception of the acquisition by TASCO during the period 1962 to 1967 of about 10 percent of its own outstanding stock in a number of unrelated purchases, there was no change in the number of shareholders or the amount of their holdings until all of the stock of TASCO was reacquired in April 1967. From 1962 until his stock was reacquired in April 1967, Houser held approximately 15.7 percent of the outstanding stock of TASCO.

During the period from 1962 until April of 1967, TASCO received income from two sources. First, it received income as a result of providing telephone answering services in the Baltimore vicinity. In addition, TASCO received income as the result of having contracts with North American and Houston

whereby TASCO provided management services to both corporations in exchange for management service fees. These were the only sources of income to TASCO, since neither Houston nor North American ever declared or paid a dividend.

In June of 1965, TASCO was contacted by representatives of the General Waterworks Corporation with respect to the possibility of its acquiring the stock and obligations of Houston. Negotiations were begun and in January of 1966 it was proposed that General Waterworks acquire the stock and debt of Houston in exchange for cash. On February 15, 1966, a meeting was held between representatives of TASCO and General Waterworks to discuss the possible sale of the Houston stock and debt to General Waterworks.

Negotiations between TASCO and General Waterworks regarding the sale of the Houston stock and debt continued throughout March until, in late April 1966, a general agreement was reached on the details of the sale. While there were some negotiations conducted with respect to the purchase by General Waterworks of North American's Bala-Cynwyd telephone answering service and some minor discussions regarding the sale of some other answering services, there was no substantial effort made by TASCO to dispose of *all* of the answering services and stock held by it. Meanwhile, on March 18, 1966, TASCO formed New TASCO, as a new subsidiary, then called Telephone and Radio Answering Service Company, Inc. — Maryland.

On May 13, 1966, at a meeting of the board of directors of TASCO both a plan, entitled "Plan of Complete Liquidation and Dissolution of Telephone Answering Service Company, Inc.," and a contract covering the sale of the stock and debt of Houston to General Waterworks were approved.

On June 8, 1966, TASCO formed another new subsidiary, Telephone and Radio Answering Service Co., Inc., — Texas (Radio).

On October 18, 1966, New TASCO issued 20,000 shares of its stock to TASCO in exchange for cash. This cash was subsequently transferred by New TASCO to Radio in exchange for 100 percent of the stock of that

corporation. Radio then used the proceeds of this stock issue to purchase from Houston certain radio-telephone licenses which had been issued by the Federal Communications Commission (FCC). FCC regulations required that its approval be obtained before radio-telephone licenses could be transferred. Rather than delay the transfer of the Houston stock and debt to General Waterworks, TASCO went through the previously described steps so that the radio-telephone licenses could be maintained in its control pending FCC approval of the transfer to General Waterworks and the remainder of the assets of Houston could immediately be placed under the control of General Waterworks by the transfer of the Houston stock by TASCO. Once FCC approval was obtained, the Radio stock, which was held by TASCO through its subsidiary, New TASCO, was sold to General Waterworks.

The stock of and debt owing by Houston was sold by TASCO to General Waterworks on October 31, 1966. As a result of this sale, TASCO realized a gain of $268,994.85. This realized gain is computed as follows:

Selling price		$723,675.00
Less: Original Cost	$383,700.00	
Legal & Accting. Fees	7,615.00	
Accts. Rec. from Houston	63,365.15	[1]454,680.15
Gain on Sale		268,994.85

[1] We note that TASCO claimed the amount of $550,880.39 as the cost of its Houston stock on its consolidated Federal income tax return for the fiscal year ended November 30, 1966. The difference between the stipulated figure and the reported figure is unexplained.

TASCO had management service contracts with both Houston and North American. Pursuant to the terms of these contracts, TASCO was to receive a fee equal to 2 percent on the collection of each corporation's accounts receivable. TASCO's management service contract with Houston terminated on October 31, 1966, the date of the sale of the stock and debt to General Waterworks. The management service contract between TASCO and

North American terminated on November 3 1966. A new management agreement based on a fee equal to 8 percent of the accounts receivable was entered into between North American and New TASCO on December 1, 1966.

On March 27, 1967, New TASCO authorized and issued an additional 65,025 shares of stock to TASCO in exchange for which TASCO, on March 31, 1967, transferred to New TASCO all of the assets needed to operate its telephone answering services in the Baltimore area, all of the assets needed to provide management services, certain other assets, and all of its obligations. The only assets not transferred by TASCO to New TASCO on March 31, 1967, were the North American stock, the New TASCO stock, and cash in the amount of $722,712.50. New TASCO's income was thus derived from providing telephone answering services in Baltimore and its suburbs and from providing management services to North American.

On March 27, 1967, North American authorized and issued 85,025 shares of its stock to TASCO in exchange for the 1,000 shares of its outstanding stock which was currently held by TASCO (100 percent).

On April 19, 1967, TASCO distributed to its shareholders all of the cash, North American stock (100 percent), and New TASCO stock (100 percent) held by it.

On April 28, 1967, one or two days after the Articles of Dissolution of TASCO were filed with the State of Maryland, New TASCO, which had been operating under the name of Telephone and Radio Answering Service Co., Inc., changed its name to Telephone Answering Service Co., Inc., the same name used by TASCO.

On January 20, 1967, the management of North American was authorized by its board of directors to negotiate with Houser, the holder of approximately 15.7 percent of the outstanding stock of TASCO, for the purchase by him of the telephone answering services run by North American in Joliet, Illinois. On January 31, 1967, Houser submitted an offer to North American to purchase the Joliet answering services. In March

1967, an agreement with respect to this purchase by Houser was approved by the directors of North American. During April 1967, Houser resigned as an officer and director of TASCO. Simultaneously with his resignation, North American transferred its Joliet, Illinois, operation to Houser in exchange for all the New TASCO and North American stock held by him. North American subsequently transferred the New TASCO stock which it received to New TASCO in exchange for the cancellation of part of a previously assigned debt.

Throughout the years 1965 and 1966, North American continued to service its customers (with the exception of those in the Joliet, Illinois area) without the slightest interruption in service. Upon the transfer of TASCO's assets to New Tasco, New TASCO took over the telephone answering service operations which were previously operated by TASCO. The customers were never notified that they were being serviced by a different organization.

New TASCO's offices were identical with those which previously been used by TASCO. Since New TASCO's address and telephone numbers were identical with those used by TASCO, New TASCO continued to use the stationery which had formerly been used by TASCO. The forms used by New TASCO to communicate with customers were identical to those previously used by TASCO. No effort was made by New TASCO to alter any of the procedures for dealing with customers.

New TASCO did obtain a new employee identification number and did secure new bank accounts; however, the bank accounts were maintained in the same lending institutions and, although the unemployment insurance account number was new, the experience rating of New TASCO was identical with that formerly given TASCO. With the exception of Houser, all of the persons employed by New TASCO were identical with those who had been employed by TASCO.

The shareholders of New TASCO, who numbered approximately 40 to 50, were, with the exceptions enumerated below, identical both in number, name, and percentage of ownership with those who were the

shareholders of TASCO from approximately mid-year 1962 until it filed Articles of Dissolution in April 1967. The only significant difference in the ownership of New TASCO, as compared with that of TASCO, was that Houser, the owner of 15.7 percent of the TASCO stock and 15.7 percent of the New TASCO stock, immediately upon New TASCO's acquisition of TASCO's assets, transferred his new TASCO stock to North American in an exchange previously described. Therefore, Houser was a shareholder of New TASCO for a minimal period of time. There were, however, some minor reacquisitions of stock by New TASCO. The reacquired New TASCO stock was held by nine people and amounted to less than 5 percent of the total stock oustanding. This stock was reacquired at the rate of $1.50 per share. Identical reacquisitions were made by North American at the rate of $2.50 per share. The parties have stipulated that no significant changes in the percentage of ownership of New TASCO or North American were brought about by the aforesaid stock reacquisitions.

TASCO's, Houston's, and North American's receipts and income as reported for the fiscal year ended November 30, 1965 are as follows:

	TASCO	HOUSTON	NORTH AMERICAN
Gross receipts from telephone answering services	$194,343.26	$685,854.37	$319,090.39
Management fees	[1]60,148.45		
Other income	4,486.69	1,502.88	3,578.57
Total income	$258,978.40	$687,357.25	$322,668.96
Total deductions	239,056.69	674,580.43	308,948.86
Net income before taxes and Net operating loss deduction	19,921.71	12,776.82	[2]13,720.10

[1] Of this amount, $53,539.07 was paid by Houston and $6,609.38 was paid by North American.

[2] North American claimed a net operating loss deduction of $43,154.11, which turned a taxable income of $13,720.10 into a loss of $29,434.01.

TASCO'S, Houston's, and North American's receipts and income as reported for the fiscal year ended November 30, 1966 (ended October 31, 1966 for Houston) are as follows:

	TASCO[1]	HOUSTON	NORTH AMERICAN
Gross receipts from telephone answering services	$187,203.02	$701,756.83	$333,362.87
Management fees	[2]74,625.71		
Other income	24,915.99	254.52	3,585.03
Total income	286,744.72	702,011.35	336,947.90
Total deductions	243,702.46	681,007.56	315,491.93
Net income before taxes	43,042.26	21,003.79	21,455.97

[1] The sale of TASCO's Houston stock to General Waterworks is reflected on the return for this year but no gain on the sale is included in income.

[2] Of this amount, $68,116.05 was paid by Houston and $6,509.66 was paid by North American.

TASCO's balance sheets as reported for the fiscal years ended November 30, 1965 and November 30, 1966 are as follows:

ASSETS	1965	1966
CURRENT ASSETS:		
Cash	$ 20,764.15	$ 49,490.14
Trade accounts receivable — net	3,748.76	17,294.35
Escrow funds		50,000.00
Prepaid expenses	90.89	2,427.70
Short-term marketable securities (at cost and accrued interest)		695,591.58
TOTAL CURRENT ASSETS	24,603.80	814,803.77
SUBSIDIARY COMPANIES		
Investment in capital stock	558,700.00	205,000.00
Notes and accounts receivable	128,335.61	13,031.54
	687,035.61	218,031.54
OTHER ASSETS:		
Advance to officer	2,500.00	
	2,500.00	

FURNITURE AND EQUIPMENT:		
Furniture and equipment — at cost	17,577.21	21,551.62
Less allowances for depreciation	7,790.85	12,511.79
	9,786.36	9,039.83
Leasehold improvements, less amortization	709.20	627.88
	10,495.56	9,667.71
INTANGIBLES:		
Covenants not to compete	28,789.70	124.94
Other intangibles	25,336.84	25,336.84
	54,126.54	25,461.78
DEFERRED CHARGES:		2,773.60
	778,761.51	1,070,738.40
LIABILITIES		
CURRENT LIABILITIES:		
Trade accounts payable	3,611.97	11,276.15
Compensation and related taxes	7,005.37	6,123.34
Taxes on income — estimated	4,861.98	29,485.15
Current maturities of long-term debt	3,625.00	
TOTAL CURRENT LIABILITIES	19,104.32	46,884.64
STOCKHOLDERS' EQUITY:		
Capital stock	89,255.00	94,270.00
Capital in excess of par value of capital stock	660,330.00	660,330.00
Retained earnings	56,722.19	372,868.76
Less amount over par value for capital stock in treasury	(46,650.00)	(103,615.00)
	759,657.19	1,023,853.76
	778,761.51	1,070,738.40

On its consolidated corporate Federal income tax return for the taxable year ended November 30, 1966, TASCO reported a gain of $172,794.61 from the sale of its Houston stock but did not include said amount in its income because of the nonrecognition provisions of section 337. In his notice of deficiency, respondent

determined that the realized gain on the sale was $268,994.85 and that such gain was taxable because "there was not a distribution of [TASCO's] assets in complete liquidation necessary to bring the sale within the nonrecognition of gain provisions of section 337."

Petitioner (TASCO) was a corporation engaged, directly and through its wholly-owned subsidiaries (Houston and North American), in the operation of telephone answering services in various parts of the country. In addition, TASCO provided managerial services to Houston and North American. TASCO was approached by an unrelated party desiring to purchase the Houston operation. Willing to part with its subsidiary, but unwilling to be taxed on the gain it would realize thereby, TASCO planned and executed within a 12-month period this series of transactions: It adopted a "Plan of Complete Liquidation and Dissolution," then sold the Houston stock for cash. Next, it transferred all of its directly-owned business assets to a recently organized subsidiary (New TASCO) in exchange for that corporation's stock. Finally, TASCO dissolved, distributing pro-rata among its shareholders the cash it received from the sale of Houston plus the North American and New TASCO stock.[2]

Petitioner claims that following these steps it was completely liquidated, and therefore section 337[3] requires nonrecognition of the gain realized on its sale of Houston. We disagree, and hold that the requirements

[2] A substantially contemporaneous exchange resulted in the transfer of one of North American's businesses to William A. Houser, a 15.7 percent shareholder of TASCO, in redemption of all of his stock in North American and New TASCO.

[3] The pertinent portion of that section is as follows:

SEC. 337. GAIN OR LOSS ON SALES OR EXCHANGES IN CONNECTION WITH CERTAIN LIQUIDATIONS.

(a) General Rule.—If—

(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims,

of that section have not been satisfied.[4] Our decision is founded on both the history and the purpose of the statute.

Section 337 was first enacted as part of the 1954 Code. It was intended by Congress to avoid the "shadowy and artificial" distinction between a closely held corporation and its shareholders required by *Commissioner v. Court Holding Co.*, 324 U.S. 331 (1945), and *United States v. Cumberland Public Service Co.*, 338 U.S. 451 (1950), when corporate assets are sold during liquidation. See H. Rept. No. 1337, 83d Cong., 2d Sess., pp. 38, A106 (1954); S. Rept. No. 1622, 83d Cong., 2d Sess., pp. 48, 258 (1954). That section permits the avoidance of a double tax by allowing nonrecognition of gain at the corporate level, without the *Court Holding-Cumberland* requirement of proving that the shareholders, not the corporation, made the sale. Congress placed a price on nonrecognition, however, which is that the sale shall be followed by complete liquidation.

then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

[4] Although the notice of deficiency merely denied the applicability of section 337, respondent in this Court concentrates principally on the argument that the instant transaction was a reorganization meeting the requirements of sections 354 and 368(a)(1)(D). We find it unnecessary to reach this issue, particularly with regard to the question whether New TASCO acquired "substantially all" of TASCO's assets, and we express no opinion as to its proper resolution. Similarly, we do not consider the proposition, disavowed by respondent, that the exchange should be treated in whole or in part as a divisive reorganization qualifying under section 355. In this context, we emphasize that we are dealing herein with the question of nonrecognition of gain *at the corporate* level and not with the tax consequences of the transactions *at the shareholder level;* in view of the complexities involved in determining those consequesces, under a variety of permutations and combinations, it is conceivable that they might be subjected to a different analysis. See *Kansas Sand & Concrete Co.*, 56 T.C. 522, 530 (1971), affd. 462 F.2d 805 (C.A. 10, 1972). Compare *May B. Kass*, 60 T.C. 218 (1973), affirmed without opinion, 491 F.2d 749 (C.A. 3, 1974). Compare also *Estate of Henry P. Lammerts*, 54 T.C. 420, 447 et seq. (1970) (dissenting opinion).

The Internal Revenue Code does not define a complete liquidation. Clearly, the term conveys more than the formal dissolution of a corporation under state law. *Pridemark, Inc., v. Commissioner,* 345 F.2d 35, 41 (C.A. 4, 1965). In contrast with some other parts of the Code (compare, e.g., sections 331 and 336), section 337 is hedged with specific provisions designed to describe, at least in outline, the complete liquidations entitled to its benefits. The sale and distribution must be preceded by the adoption of a "plan of complete liquidation." More importantly, "*all of the assets* of the corporation" (less assets retained to meet claims) must be "*distributed* in complete liquidation." (Emphasis added.) This language evidences an intent to require a bona fide elimination of the corporate entity and does not include a transaction in which substantially the same shareholders continue to utilize a substantial part of the directly owned assets of the same enterprise in uninterrupted corporate form.[5] See footnote 9, *infra.*

The record herein demonstrates that TASCO sought to avoid the recognition of gain on the sale of Houston. But, the presence or absence of a tax avoidance objective is irrelevant in determining what is a "complete liquidation" for tax purposes. *United States v. Cumberland Public Service Co., supra,* 338 U.S. at 455. While a complete liquidation is a prerequisite to the application of section 337, the mere adoption of a plan denominated as one of "complete liquidation" and purported compliance therewith does not preclude further inquiry on our part. It is the reality and substance of the liquidation that counts. Compare *Lewis v. Commissioner,* 176 F.2d 646, 649-650 (C.A. 1, 1949). See also *Gregory v. Helvering,* 293 U.S. 465 (1935).

[5] This interpretation is supported by Congress' failure to make section 337 applicable to sales of property in connection with partial liquidations and nonliquidating distributions, in which the corporate form is retained, despite the possibility of the same "double tax" dilemma arising as with complete liquidations. See sections 311, 336; *Waltham Netoco Theatres, Inc.,* 49 T.C. 399 (1968), affd. 401 F.2d 333 (C.A. 1, 1968). Section 333 of the House bill would have extended nonrecognition treatment to partial liquidations; the limitation to complete liquidations originated in the Senate Finance Committee. See S. Rept. No. 1622, 83d Cong., 2d Sess. (1954) at pp. 258-259.

In *Pridemark, Inc., v. Commissioner, supra,* the Fourth Circuit stated (345 F.2d at 41):

> The corporation must have ceased to be a going corporate concern, or if the enterprise is continued in corporate form, the shareholder must have disassociated himself from it. See Regs. 1.332-2(c) (1955). If the liquidated business is not resumed by the new corporation as a continuation of a going concern, there is a "complete liquidation."

Similarly, in *Davant v. Commissioner,* 366 F.2d 874, 882 (C.A. 5, 1966), modifying 43 T.C. 540 (1965), the Fifth Circuit stated:

> Those provisions [dealing with complete liquidation] contemplate that the operating assets will no longer be used by the stockholders to carry on the business as a corporation.

See also *Lewis v. Commissioner, supra,* 176 F.2d at 649.[6] Both *Court Holding Co.,* and *Cumberland Public Service Co., supra,* which prompted the adoption of section 337, involved the sale of a corporate enterprise and the termination of the shareholders' interest in the buisiness. It is not without significance that the Supreme Court, in the latter case, specifically distinguished gains in the course of a "genuine liquidation" from those of a "going concern." See 338 U.S. at 454-455. Moreover, during its consideration of the Internal Revenue Code of 1954, the House Ways and Means Committee stated:

> [a] corporation will be deemed to have completely liquidated even though the business previously carried on by it is continued in partnership or sole proprietorship *or other noncorporate form.* [Emphasis added. H. Rept. No. 1337, 83d Cong., 2d Sess., p. A112 (1954).][7]

[6] See *Estate of John L. Bell,* T.C. Memo. 1971-285.

[7] See also H. Rept. No. 1337 at pp. A106-A107; S. Rept. No. 1622, 83d Cong., 2d Sess., pp. 48-49, 258-259. The House bill contained, in section 336, definitions of complete and partial liquidations, which required *inter alia* a plan "under which the *termination of the business* or businesses and the *transfer of assets in redemption* of all or part of the stock is authorized * * *." [Emphasis added.]

Clearly, the transactions under consideration herein did not meet the foregoing standards. The businesses which petitioner directly operated were continued without interruption by New TASCO, with substantial continuity of shareholder interest. The only result of the transaction was to place the North American stock and a sizable amount of cash in the shareholders' hands. New TASCO was merely the alter ego of petitioner with respect to all of its directly owned business assets; its formation and utilization served no purpose other than masking a distribution as one in complete liquidation. It is possible that the transactions can be treated as accomplishing a partial liquidation of petitioner within the meaning of section 346. We express no opinion on this score because, even if the requirements of a partial liquidation were found to have been met, section 337 would not apply. That section requires a "complete liquidation." See footnote 10, *supra*. Compare Rev. Rul. 60-50, 1960-1 C.B. 150. The transitory co-existence of TASCO and New TASCO does not support the conclusion that the subsequent but prearranged liquidation of the former effected a sufficient transmutation of the assets of petitioner out of corporate solution to satisfy the requirement of section 337 that "all of the assets of the corporation" be distributed. To hold for the petitioner in the instant case would frustrate the congressional purpose to deny section 337 treatment in connection with distributions of ongoing corporations. We cannot give tax effect to the "mere shifting of charters," *Helvering v. Elkhorn Coal Co.*, 95 F.2d 732, 734 (C.A. 4, 1938), masquerading as a complete liquidation.

The facts before us are unlike those in *Breech v. United States*, 439 F.2d 409 (C.A. 9, 1971), and *Hyman H. Berghash*, 43 T.C. 743 (1965), affd. 361 F.2d 257 (C.A. 2, 1966). Those cases applied section 337 to liquidation-reincorporation transactions in which the continuity of shareholder interest between the old and new corporations was insufficient to satisfy the definition of a statutory reorganization.[8] It was felt inappropriate to

[8] In *Breech*, the Court rested its decision on the ground that the attribution rules do not apply to reorganizations. See 439 F.2d at 411. See also *Hyman H. Berghash*, 43 T.C. 743, 757 (1965), affd. 361 F.2d 257 (C.A. 2, 1966). We also note that

deny the existence of a complete liquidation where Congress had found the shift in ownership adequate to justify considering the transferee as a new, rather than a continuing, enterprise. Compare *Estate of Henry P. Lammerts*, 54 T.C. 420 (1970), remanded per curiam on another issue, 456 F.2d 681 (C.A. 2, 1972); *Joseph C. Gallagher*, 39 T.C. 144 (1962). Where such divergence in shareholder interest does not exist and the transferee corporation continues the business of the transferor, the courts have consistently held that no complete liquidation occurs. *American Manufacturing Co.*, 55 T.C. 204 (1970); *Mark E. DeGroff*, 54 T.C. 59 (1970), affirmed per curiam, 444 F.2d 1385 (C.A. 10, 1971); *Ralph C. Wilson, Sr.*, 46 T.C. 334 (1966); *South Texas Rice Warehouse Co.*, 43 T.C. 540 (1965), affirmed in part and reversed in part sub nom. *Davant v. Commissioner, supra; James Armour, Inc.*, 43 T.C. 295 (1964); *John G. Moffatt*, 42 T.C. 558 (1964), affd. 363 F.2d 262 (C.A. 9, 1966).

Here, immediately after the dissolution of TASCO both of its directly-owned businesses were continued by New TASCO, and, even if the contemporaneous, but apparently unrelated, redemption of the Houser shares (see footnote 7, *supra)* is taken into account, there remains a degree of shareholder continuity in excess of 84 percent. In short, petitioner has not satisfied the requirements of section 337.[9]

To reflect the concessions of the parties on other issues,

Decision will be entered under Rule 155.

in *Berghash*, the parties had stipulated that a "complete liquidation" had taken place. See 43 T.C. at 759.

[9] Nothing we have said should be construed as holding that section 337 does not apply where one corporate tier is eliminated through the complete liquidation of a parent corporation and no directly-held assets of the parent corporation remain in corporate solution. Nor do we necessarily preclude the applicability of section 337 where the amount of such assets remaining in corporate solution can be said to be *de minimis*. Compare *Mountain Water Co. of La Crescenta*, 35 T.C. 418, 428 (1960); Rev. Rul. 66-284, 1966-2 C.B. 115.

Reviewed by the Court.

STERRETT, J. dissenting: As argued by the parties the issue presented to the Court is whether the sale in question was made pursuant to a plan of complete liquidation as contended by petitioner or was merely part of an integrated transaction constituting a reorganization as maintained by respondent.

Specifically respondent asserts that the entire transaction qualifies as a reorganization within the meaning of sections 368(a)(1)(D) and 354.[1] I would hold otherwise on the grounds that the legislative history[2] makes it quite clear that section 354(b) was not designed to cover divisive reorganizations (a split-up in this case).

This Court has faced before, on several occasions, the issue of how to categorize a transaction that does not meet the requirements of the reorganization provisions, In *Joseph C. Gallagher,* 39 T.C. 144 (1962) we said:

> * * * The liquidation of Delaware, although the business was continued by California with considerable change in the corporate structure, falls squarely within the first definition of a partial liquidation.[32] Congress intended that in this situation, any redemption could not be treated as essentially equivalent to a dividend, and that *this problem of the continuation of a business must be dealt with, if at all, under the reorganization sections. Since these facts do not fall within the careful language of those sections, the distributions should be treated as payment in exchange for the stock.* To find differently would be to enact that provision which has failed on two separate occasions to be enacted by Congress. See H. Conf. Rept. No. 2543, to accompany H.R. 8300 (Pub. L. 591), 83d Cong., 2d Sess., p. 41 (1954),[33] and H.R. 4459, 86th Cong., 1st Sess., sec. 26 (1959). [39 T.C. at 163] [Footnotes omitted; Emphasis added.]

[1] Respondent does not suggest that section 355 is applicable, presumably because of the requirements contained in subsection (b)(1) thereof.

[2] See S. Rept. No. 1622, to accompany H.R. 8300 (Pub. L. No. 591), 83d Cong., 2d Sess., pp. 263-264, 265, and 266 (1954).

Our *Gallagher* approach was approved in *Commissioner v. Berghash,* 361 F.2d 257, 260 (2nd Cir. 1966), affg. 43 T.C. 743 (1965). See also *Estate of Henry P. Lammerts,* 54 T.C. 420 (1970), affirmed per curiam in part and remanded per stipulation, 456 F.2d 681 (2nd Cir. 1972).

Since the transaction then does not fall within the reorganization provisions, which are designed to cover the instances of the continuation of an existing business through a liquidation coupled with an intercorporate transfer, it follows under the teachings of prior case law that the transaction must, perhaps by definition of terms, be treated as a liquidation.

For years respondent, when faced with a liquidation-reincorporation transaction, had sought to extract an ordinary income tax on the distribution either by calling the transaction a reorganization with boot or a naked distribution taxable under sections 301 or 302. Insofar as I am aware respondent has only prevailed when this or any court has found a reorganization accompanied by a non-qualifying distribution taxable as boot.[3] When a court has not found a reorganization, respondent has inevitably lost with the distribution deemed to be made in exchange for stock. Never has the respondent prevailed on the section 301-302 argument.

Now for the first time, if the logic of the majority's holding is extended, the respondent will win his point. "How sweet it will be" and who could have expected it when the respondent was simply trying to forestall the applicability of section 337 by invoking the reorganization provisions. The majority's holding is rather gratuitous, to say the least.

The majority seeks to make its decision at the corporate level more palatable by suggesting that consistency is not required between the transaction's treatment at the corporate level and at the shoreholder level,[4] implying that a section 337 liquidation must be

[3] The majority did not mention that this was the finding of the courts in the decisions it cites on page 25-26 in support of its conclusion.

[4] Yet see the discussion in *Madison Square Garden Corp. v. Commissioner,* 500 F.2d 611 (2nd Cir. 1974) on the question of consistency.

more "complete" than a section 331 liquidation. This novel suggestion finds no support in any decisional law and in fact flies in the face of the discussion of these sections in such cases as *Commissioner v. Berghash, supra,* and *Breech v. United States,* 439 F.2d 409 (9th Cir. 1971). In my judgment the majority is simply playing with words in order to reach what is, I suspect, a preconceived desired result. An unfortunate by-product of this form of rationalization is the creation of uncertainty where none had existed and, if there is one thing our income tax laws do *not* need, it is more uncertainty.

The majority seems preoccupied with a continuity of shareholder interest approach. The minimal (less than 15 percent) continuity of assets is ignored. Even the House version of section 357 of the 1954 Code required, among other things, a 50 percent continuity of assets before ignoring a purported liquidation. The opinion leaves up in the air what magic percentage combination of shareholder and asset transfer will, in the future, invalidate an asserted liquidation.

In this fully stipulated case I note that there is no evidence that there was, or was not, a business purpose to the transaction in issue. Of course, it is well established that the existence of a business purpose is irrelevant to the determination of whether a complete liquidation took place. *United States v. Cumberland Public Service Co.,* 338 U.S. 451, 455 (1950).

Finally, the majority relies heavily on certain dicta[5] in *Pridemark, Inc. v. Commissioner,* 345 F.2d 35 (4th

[5] Dicta, incidentally, which has apparently been rejected by the Courts of Appeals for three circuits. *Commissioner v. Berghash,* 361 F.2d 257 (2nd Cir. 1966), *Breech v. Commissioner,* 439 F.2d 409 (9th Cir. 1971), *Genecov v. United States,* 412 F.2d 556 (5th Cir. 1969).

An examination of the record in the *Pridemark* case reveals, in unobjected-to requests for findings of fact by the respondent, that Pridemark continued making sales for Golden Key into October 1958 and that the agency agreement between them was not in fact terminated until October 24, 1958. The very next month, November, 1958, the old shareholders of Pridemark initiated a search for a new builder of homes that it could sell. Thus, the shareholders

Cir. 1965). This reliance is rather odd since the fact of the matter is that the final holding of that court was that a liquidation had in fact taken place. I must also note that in *Pridemark,* as in the instant case, the controlling shareholders remained the same and that, also in both cases, minimal assets were "reincorporated." It may well be argued that the majority has misconstrued its authority.

For the foregoing reasons I would stick with existing law and find for petitioner.

DAWSON and DRENNEN, JJ., agree with this dissent.

sought to remain, and were subsequently successful, in the same line of business activity virtually without a break. The Court of Appeals still found that a valid liquidation had taken place. We must note, however, that the Court of Appeals, 345 F.2d at 41, found that the principal shareholders stopped selling homes "for over one year," but I respectfully submit that this factual holding is in error.

APPENDIX B

UNITED STATES TAX COURT

Docket No. 1544-69

Telephone Answering Service Co., Inc.
(Subsidiary Companies:
Telephone Answering Service, Inc.
North American Answering Service, Inc.
Telephone and Radio Answering
Service Company, Inc. (Maryland)
and
Telephone and Radio Answering
Service Company, Inc. (Texas))
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

DECISION

Pursuant to the opinion of the Court filed December 24, 1974, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: That the following statement shows the petitioner's income tax liabilities for the taxable years ending November 30, 1965 and November 30, 1966:

Tax Year Ended November 30, 1965	
Deficiency in tax — all of which has been paid	$ 3,585.14
Tax Year Ended November 30, 1966	
Deficiency in tax	$70,566.46

(Signed) THEODORE TANNENWALD, JR.
Judge

Entered: May 27, 1975

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

/s/ JOHN S. MCDANIEL, JR. 5/9/75
Counsel for Petitioner
Cable, McDaniel, Bowie & Bond
The Blaustein Building
Baltimore, Maryland 21201

MEADE WHITAKER
Chief Counsel
Internal Revenue Service
(Signed) GEORGE J. RABIL
May 14, 1975
Assistant Regional Counsel
422 Universal North Building
1875 Connecticut Avenue, N. W.
Washington, D. C. 20009
(202) 964-2064

APPENDIX C

United States Court of Appeals
for the Fourth Circuit)

No. 75-2118

Telephone Answering Service Co., Inc.
(Subsidiary Companies: Telephone Answering Service, Inc.; North American Answering Service, Inc.; Telephone and Radio Answering Service Company, Inc. (Maryland); and Telephone and Radio Answering Service Company, Inc. (Texas)),

Appellants,

v.

Commissioner of Internal Revenue,

Appellee.

Appeal from The United States Tax Court at Washington, D. C. Theodore Tannenwald, Jr., Judge.

(Argued: May 4, 1976 Decided: November 8, 1976.)

Before BRYAN, Senior Circuit Judge, and CRAVEN, Circuit Judge.

John S. McDaniel, Jr. (Calhoun Bond, Lawrence A. Kaufman, Cable, McDaniel, Bowie and Bond on brief) for Appellants; Ernest J. Brown, Attorney, Tax Division, Department of Justice (Gilbert E. Andrews, Attorney, Tax Division, Department of Justice, and Scott P. Crampton, Assistant Attorney General on brief) for Appellee.

PER CURIAM:

Telephone Answering Service Co., Inc. of Baltimore, Maryland (TASCO), appeals the decision of the United States Tax Court, on stipulated facts, that gain of $268,994.85, realized from the sale of one of its subsidiaries, should be recognized for income tax purposes because its plan of liquidation failed to meet the requirements of section 337 of the Internal Revenue Code of 1954.[1] On this determination a deficiency for the tax year 1966 was assessed against the appellant company to the amount of $70,566.46. We affirm.

In the opinion of the Tax Court Judge Tannenwald discussed with clarity the purpose of section 337 and the history of its application. Telephone Answering Service Co., Inc. v. Commissioner of Internal Revenue, ___ T.C. ___ (No. 1544-69) (May 27, 1975). The Tax Court held that the requirements of section 337 had not been satisfied since all TASCO's telephone answering service operations and a significant portion of its management service operations were continued without interruption by a corporation organized at the time of the sale for the benefit of shareholders virtually identical to TASCO's. We are content to rest decision on the Tax Court's opinion.

Affirmed.

---

[1] The pertinent portion of that section is as follows:

Sec. 337. GAIN OR LOSS ON SALES OR EXCHANGES IN CONNECTION WITH CERTAIN LIQUIDATIONS.

(a) General Rule. — If—

(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims,

then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

Supreme Court, U.S.
FILED
APR 20 1977
MICHAEL RODAK, JR., CLERK

No. 76-1085

In the Supreme Court of the United States

OCTOBER TERM, 1976

TELEPHONE ANSWERING SERVICE CO., INC., ETC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

MYRON C. BAUM,
Acting Assistant Attorney General,

ERNEST J. BROWN,
Attorney,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1085

TELEPHONE ANSWERING SERVICE CO., INC., ETC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. App. 1a-21a) are reported at 63 T.C. 423. The opinion of the court of appeals (Pet. App. 24a-25a) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 1976. The petition for a writ of certiorari was filed on February 4, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether gain realized by petitioner upon its sale of the stock and obligations of a subsidiary corporation

resulted in taxable income to petitioner because it did not distribute all of its assets "in complete liquidation" within the meaning of Section 337 of the Internal Revenue Code of 1954.

STATUTE INVOLVED

The pertinent provisions of Section 337 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth at Pet. 3.

STATEMENT

During 1965 and 1966, petitioner operated a telephone answering service in the vicinity of Baltimore, Maryland, and its suburbs. Petitioner owned all of the stock of two subsidiary corporations that were also engaged in that business. The subsidiaries were Telephone Answering Service, Inc. ("Houston"), which operated in several areas in Texas, and North American Answering Service, Inc. ("North American"), which operated in various suburbs of Philadelphia, Chicago, and Cleveland. Petitioner provided management services to those subsidiaries, and they paid management fees to it (Pet. App. 2a-5a).

After receipt of an inquiry concerning the possibility of sale of the stock of Houston, and preliminary negotiations to that end, petitioner's directors and stockholders in May, 1966, approved a document entitled "Plan of Complete Liquidation and Dissolution of Telephone Answering Service Company, Inc.," and also approved a contract for the sale of the stock and obligations of Houston. This sale took place in October, 1966, and petitioner realized a gain of $268,994.85 (Pet. App. 5a-6a).

In the interim, petitioner had organized another wholly-owned subsidiary corporation ("New Tasco") that subsequently adopted petitioner's name. In March, 1967, petitioner conveyed to New Tasco all of its assets except the stock of North American, the stock of New Tasco, and

slightly less cash than had been realized on the sale of the stock and obligations of Houston. Upon receipt of these assets, New Tasco assumed petitioner's obligations. In April, 1967, petitioner distributed to its shareholders the stock of New Tasco, the stock of North American, and the cash it had retained (Pet. App. 5a, 6a-7a). New Tasco, whose stock, after the April distribution, was wholly owned by petitioner's shareholders, continued the telephone answering service without interruption in the vicinity of Baltimore and its suburbs that had been operated by petitioner, in the same manner, with the same customers, the same facilities, and (with one exception) the same employees (Pet. App. 8a-9a).

On its consolidated federal income tax return for its taxable year ended November 30, 1966, petitioner reported gain from the sale of the stock and obligations of Houston, but claimed that the gain was not taxable under the non-recognition provisions of Section 337 of the Internal Revenue Code of 1954. On audit, the Commissioner determined a deficiency on the ground that petitioner's realized gain was taxable because "there was not a distribution of [petitioner's] assets in complete liquidation necessary to bring the sale within the nonrecognition of gain provisions of section 337" (Pet. App. 11a-12a).

In a reviewed decision (with three judges dissenting), the Tax Court upheld the Commissioner's determination because the transaction in this case did not meet the standard of a complete liquidation (Pet. App. 1a-21a). The Tax Court observed that a decision for petitioner "would frustrate the congressional purpose to deny section 337 treatment in connection with distributions of ongoing corporations" (Pet. App. 16a). The court of appeals affirmed, stating that it was "content to rest decision on the Tax Court's opinion" (Pet. App. 24a-25a).

ARGUMENT

The decision below correctly held that petitioner's sale of the stock and obligations of its subsidiary did not qualify for nonrecognition treatment under Section 337 of the Code. Under that provision, if a corporation adopts a plan of complete liquidation and within 12 months distributes all of its assets to its shareholders in complete liquidation, then no gain or loss is recognized to the corporation from its sale or exchange of property within the 12-month period. See *Central Tablet Mfg. Co.* v. *United States*, 417 U.S. 673, 677-683.

Petitioner recognizes (Pet. 6-7) that the courts have uniformly held that the requirements of Section 337 are not met if there is no distribution "in complete liquidation" of the corporation. Thus, where a corporation directly or indirectly transfers its assets to another corporation so that the enterprise continues in corporate form with continuity of stock ownership, resulting in a reorganization as defined by Sections 354 and 368 of the Code, with continuity in the basis of the assets provided by Section 362, there is no distribution "in complete liquidation" and Section 337 is inapplicable. See, *e.g.*, *Abegg* v. *Commissioner*, 429 F. 2d 1209 (C.A. 2), certiorari denied *sub nom. Cresta Corp., S.A.* v. *Commissioner*, 400 U.S. 1008; *Wilson* v. *Commissioner*, 46 T.C. 334, 352. See also *Pridemark, Inc.* v. *Commissioner*, 345 F. 2d 35, 41 (C.A. 4), reversing on other grounds, 42 T.C. 510.

Here, the Commissioner asserted in the Tax Court that the transfer of petitioner's operating assets to New Tasco was a "reorganization" as defined by Section 368 (a)(1)(D), and that under the uniform line of decisions referred to above, the transaction did not qualify as a liquidation under Section 337. Although petitioner argued

that New Tasco did not acquire "substantially all of the assets" of petitioner, as required by Section 354(b)(1)(A) for a reorganization defined by Section 368(a)(1)(D), the decisions likewise uniformly hold that the phrase "substantially all of the assets" refers to operating assets.[1] Since petitioner transferred to New Tasco "all of its directly-owned business assets" (Pet. App. 12a), the transaction involved "substantially all of the assets" within the meaning of the statute.

While the Tax Court did not specifically refer to the statutory reorganization provisions, except by way of the citations in its opinion (Pet. App. 17a), it pointed to the high degree of continuity in shareholder interest and in assets and operations between petitioner and New Tasco (Pet. App. 16a). In light of this continuity, it properly held that there was no complete liquidation under Section 337 and that to apply Section 337 to such an ongoing corporate relationship as was present in this case would frustrate the purpose of that provision (Pet. App. 13a-16a).[2]

---

[1]See, *e.g.*, *Moffatt* v. *Commissioner*, 363 F. 2d 262 (C.A. 9), certiorari denied, 386 U.S. 1016; *Reef Corp* v. *Commissioner*, 368 F. 2d 125, 131 (C.A. 5), certiorari denied, 386 U.S. 1018; *Babcock* v. *Phillips*, 372 F. 2d 240 (C.A. 10), certiorari denied, 387 U.S. 918; *DeGroff* v. *Commissioner*, 444 F. 2d 1385 (C.A. 10), affirming 54 T.C. 59; *James Armour, Inc.* v. *Commissioner*, 43 T.C. 295, 308-310; *Wilson* v. *Commissioner*, 46 T.C. 334, 345-348; *American Manufacturing Co.* v. *Commissioner*, 55 T.C. 204, 221-222.

[2]While we believe that the transaction between petitioner and New Tasco was a reorganization within the meaning of Section 368(a)(1)(D), and that this case could have been decided on that ground, reorganizations are not the only transactions that contemplate such continuity of ownership, operations, and basis as to be entirely antithetical to the complete liquidation required by Section 337. It is beyond dispute, for example, that whether or not the transaction between petitioner and New Tasco was a tax-free reorganization, it was

Contrary to petitioner's assertions (Pet. 6-10), the decision below does not conflict with *Commissioner* v. *Berghash*, 361 F. 2d 257 (C.A. 2), or *Breech* v. *United States*, 439 F. 2d 409 (C.A. 9). As the Tax Court pointed out (Pet. App. 16a-17a), those cases involved transfers of assets to corporations having such new and different stock ownership that there was no continuity of control, as defined by Section 368(c) of the Code. By contrast, though less than a significant number of shareholders redeemed their stock and withdrew from the enterprise (Pet. App. 8a-9a), all of the stockholders of New Tasco were stockholders of petitioner, and there was complete continuity of control.

---

a tax-free transfer of property to a controlled corporation within the provisions of Section 351, and that Section 362 provides the same continuity of basis for assets transferred pursuant to Section 351 that it does for assets transferred pursuant to a reorganization. Indeed, this Court has pointed out that Section 351 is closely related to the reorganization provisions, overlaps them in part, and fulfills many of the same functions. *Helvering* v. *Cement Investors*, 316 U.S. 527, 533-534. The question under Section 337 was whether petitioner distributed its assets in complete liquidation. The answer to that question, in the light of the continuation of petitioner's business in corporate form with beneficial interest remaining in substantially the same shareholders and with continuity of basis in the assets employed, must be in the negative, whether or not the Tax Court's opinion referred to one or another of the sections of the Code providing for corporate and tax continuity.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MYRON C. BAUM,
Acting Assistant Attorney General.

ERNEST J. BROWN,
Attorney.

APRIL 1977.

DOJ-1977-04

FILED
NOV 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1085

TELEPHONE ANSWERING SERVICE CO., INC., ETC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

JOHN S. MCDANIEL, JR.,
CALHOUN BOND,
LAWRENCE A. KAUFMAN,
915 Blaustein Building,
Baltimore, Maryland 21201,
Attorneys for Petitioner.

OF COUNSEL:
CABLE, MCDANIEL,
BOWIE & BOND,
915 Blaustein Building,
Baltimore, Maryland 21201

The Daily Record Co., Baltimore, Md. 21202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1085

TELEPHONE ANSWERING SERVICE CO., INC., ETC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

In its Brief in Opposition to the Petition for a Writ of Certiorari Respondent asserts (Resp. Br., p. 6) that the decision of the Court of Appeals for the Fourth Circuit below, in affirming the Tax Court, does not conflict with that of the Second Circuit Court of Appeals in *Commissioner v. Berghash, et al.*, 361 F.2d 257 (C.C.A. 2, 1966), or with that of the Ninth Circuit Court of Appeals in *Breech, et al. v. United States*, 439 F.2d 409 (C.C.A. 9, 1971), because "those cases involved transfers of assets to corporations having such new and different

stock ownership that there was no continuity of control, as defined by Section 368(c) of the Code".

Respondent confuses the issue and misses the point entirely. Although Section 368(c) defines "control" for purposes of several Parts of Subchapter C, it has applicability in the context of this case *only* with respect to the issue of whether or not a corporate reorganization within the meaning of Section 368(a)(1)(D) occurred — *an issue which the Courts below expressly chose not to decide.* Nowhere in Sections 331 or 337 is the term "control" used by Congress, and no authority whatsoever has been cited for its relevance to the issue of whether or not a "complete liquidation" has occurred within the meaning of those Sections.

In like manner, in *Commissioner v. Berghash, et al.,* and "without the citation of any authority", the Government had claimed "that section 337 can apply only where a bona fide termination of the business of the liquidating corporation has occurred". (43 T.C. at 758). The Tax Court quite properly found no such requirement and, following its reasoning in *Joseph C. Gallagher,* 39 T.C. 144, that if a literal liquidation cannot be brought within the reorganization sections of the Code it must be recognized for what it is, concluded (43 T.C. at 759):

> "We are unable to find any authority or any indication from the legislative history of section 337 that would require us to disregard the actual liquidation and dissolution of Delavan-Bailey."

In affirming, the Second Circuit Court of Appeals took special pains to comment upon the Tax Court's rejection of the Government's contention that if the business of the liquidated corporation is continued by a new corporation there is no "complete liquidation". Said the Court (361 F.2d at 260):

> "We are in complete agreement with the Tax Court's resolution of this issue; its interpretation reflects the normal meaning of the words 'complete liquidation' in Sections 331 and 337. To adopt the Commissioner's contention would do violence to the plain meaning of these statutes."

It is quite true, of course, that there are factual differences between *Berghash* and the instant case. The primary difference, however, is that in *Berghash* there was a substantial change in stock ownership but retention of all operating assets in corporate solution, whereas in the instant case the liquidation followed a sale of the taxpayer's largest subsidiary to an unrelated party, but the shifts in stock ownership were less significant. The point, however, is that neither the Respondent nor either of the Courts below has suggested even a single reason, much less any supporting authority, for concluding that *irrespective of whether or not a corporate reorganization has taken place,* an admitted liquidation may be a "complete liquidation" governed by *Berghash* only if a substantial change in stock ownership has occurred. The above quoted language from the decisions of both the Tax Court and the Second Circuit Court of Appeals indicates quite clearly that no such limitation was intended.

In *Breech, et al. v. United States, supra,* the Court of Appeals for the Ninth Circuit not only chose to follow both the reasoning and the result reached by the Second Circuit in the *Berghash* case, but followed it in circumstances where but for the fact that the attribution rules of Section 318 of the Internal Revenue Code do not apply for purposes of Section 368(c), the continuity of stock ownership as between the liquidating corporation and the corporation which purchased its assets would have been sufficient to have characterized the transaction as a Section 368(a)(1)(D) reorganization. After holding that the Government's argument for a "D" reorganization failed because such attribution cannot be made, the Court turned to its alternative

argument that a "complete liquidation" had not taken place within the meaning of Sections 331 and 337. On this issue the Court squarely adopted the holding of the Second Circuit in *Berghash* without even suggesting, as Respondent does in the instant case, that the reasoning of the Court in *Berghash* should not apply where there is a continuity of interest in the same stockholders. There is no rational basis for a conclusion that *absent compliance with the requirements for a reorganization* an admitted liquidation is any less "complete" where a continuing interest is retained through direct ownership, as in the present case, rather than indirectly, as in *Breech*.

CONCLUSION

Neither *Commissioner v. Berghash, et al.*, 361 F.2d 257 (C.C.A. 2, 1966), nor *Breech, et al. v. United States*, 439 F.2d 409 (C.C.A. 9, 1971), may be construed as narrowly as Respondent or the Courts below have suggested. Both decisions stand squarely for the proposition that a liquidation must be recognized as "complete" within Sections 331 and 337 of the Internal Revenue Code *unless the transaction can be characterized as a corporate reorganization within Section 368(a)(1)*. The decision of the Court of Appeals for the Fourth Circuit in this case that an admitted liquidation may not be "complete" even though it is not a reorganization within Section 368(a)(1) is squarely in conflict with these decisions of the Courts of Appeals for the Second and Ninth Circuits.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN S. MCDANIEL, JR.,
CALHOUN BOND,
LAWRENCE A. KAUFMAN,
915 Blaustein Building,
Baltimore, Maryland 21201,
Attorneys for Petitioner.

OF COUNSEL:
CABLE, MCDANIEL,
BOWIE & BOND,
915 Blaustein Building,
Baltimore, Maryland 21201

April 1977.